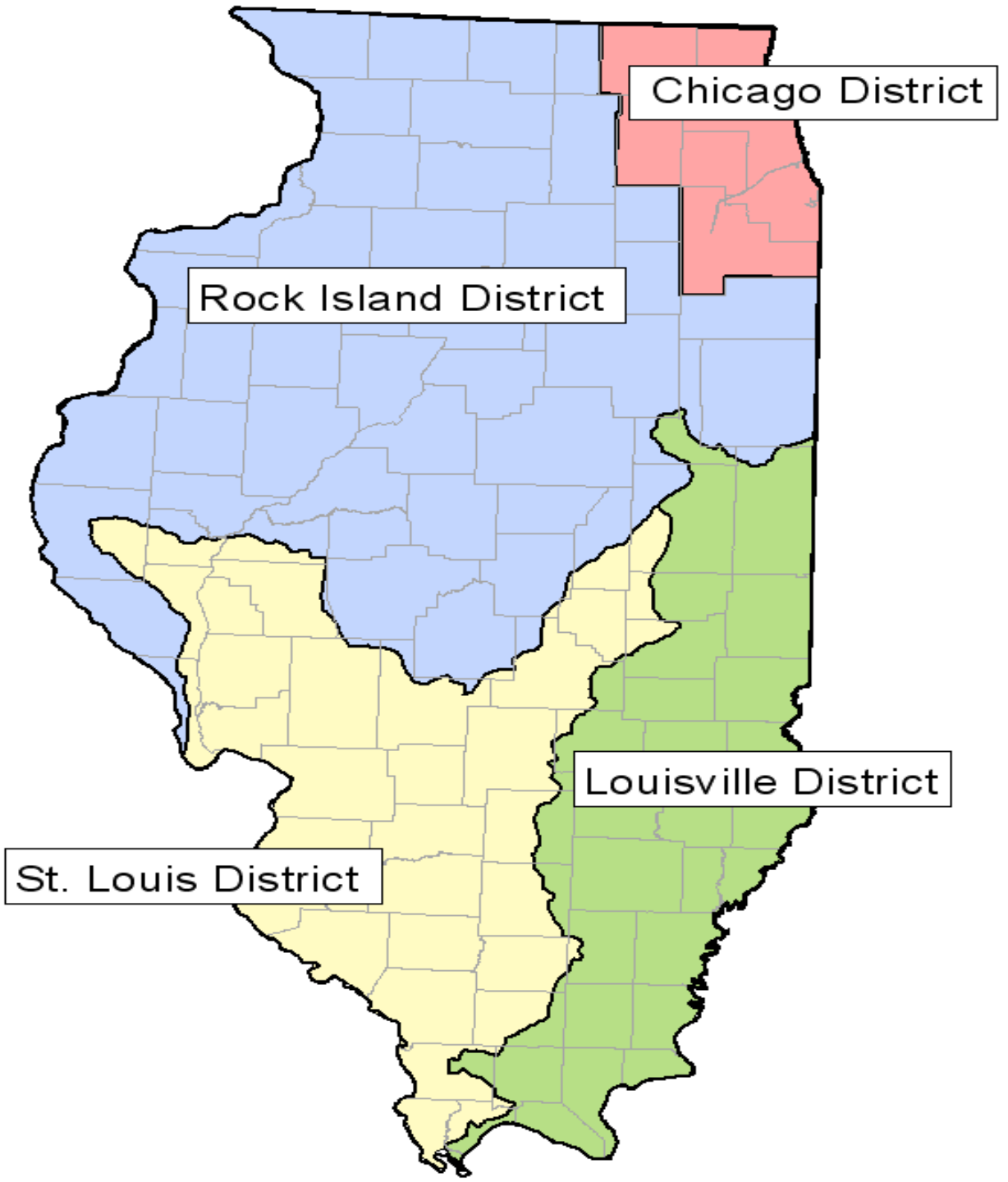

Chicago District
Rock Island District
Louisville District
St. Louis District

Joint Army-EPA Mitigation Rule

Mitigation Rule

- **Authority** - National Defense Authorization Act FY04
- **References** - NRC Report and aspects of current regulations & guidance
- **Goal** – level playing field (permittee, Mitigation Banks, ILFs) to the maximum extent practicable
- **Performance Standards** – ecologically-driven, equivalent/effective standards, best available science
- **Compliance** – increase compliance visits, establish enforceable success criteria, prescribed monitoring reports
- **Mitigation Sequence Preserved** - avoid, minimize, compensate for unavoidable impacts and lost aquatic functions
- Does not change ***when*** mitigation is required
- Does change ***where*** and ***how***

Benefits of the Mitigation Rule

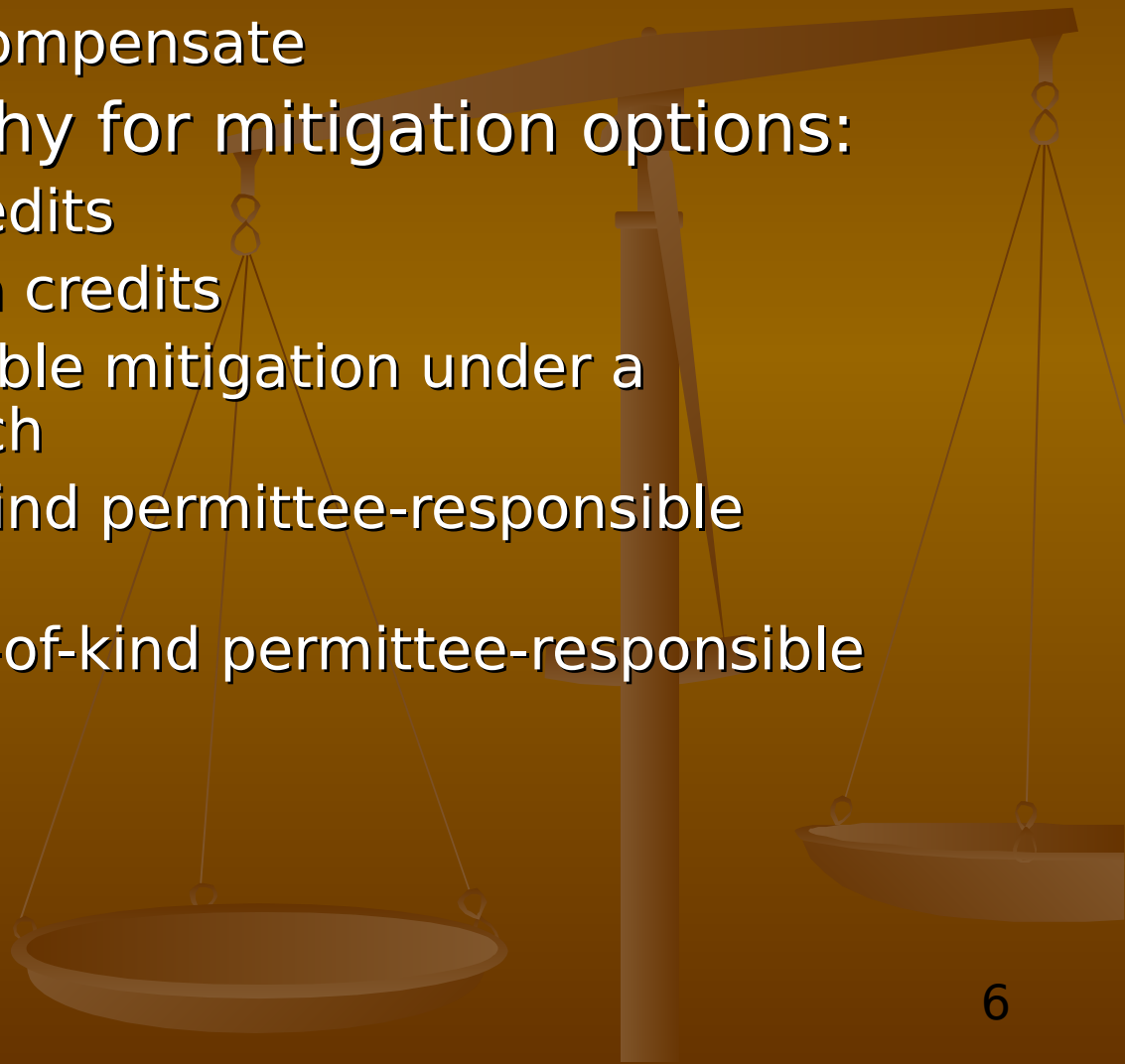
- Greater predictability, transparency
- Improved mitigation planning and site selection
- Improved performance of compensatory mitigation projects
- Possible reduction in permitting time
- Flexibility of mitigation options
- Increased public participation
- Strongly encourages watershed approach

Watershed Approach
(recommended by National Research Council)

- Strategic site selection to improve or maintain watershed functions
- Use available watershed planning information
- Consider type of mitigation, landscape position, and other factors to provide desired functions
- Level of information and analysis commensurate with the scope of permitted activity
- May use multiple sites – e.g., on-site for water quality, water storage; off-site for habitat
- Allows preservation, riparian areas, and buffers

Principles in Final Rule

- Mitigation sequence retained
  - avoid, minimize, compensate
- Preference hierarchy for mitigation options:
  - Mitigation bank credits
  - In-lieu fee program credits
  - Permittee-responsible mitigation under a watershed approach
  - On-site and/or in-kind permittee-responsible mitigation
  - Off-site and/or out-of-kind permittee-responsible mitigation



Principles in Final Rule

- District engineer is the decision-maker
- Mitigation bank or ILF – responsibility to provide compensatory mitigation is transferred to the sponsor when permittee secures credits
- Long-term management may be transferred to another entity
- Performance standards ecologically-driven
- Adaptive management – make fixes for successful performance

Requirements for Mitigation Banks and In-Lieu Fee Programs

- Prospectus
- Public notice and comment process
- IRT review, with dispute resolution process, if needed
- Approved instrument required
- Approved mitigation plans with credit release schedules
- Ledgers for all credit transactions
- DE approval required to release credits
- Suspension and/or termination of instrument if poor performance

Additional Requirements for In-Lieu Fee Mitigation

- Only non-profits or governments
- Compensation planning framework required to identify, plan, and implement ILF projects, support watershed approach, and justify advance credits
- Advance credits – limited number of credits that can be sold before ILF projects are established and meeting performance standards
- ILF funds collected for compensation may only be used for compensation projects minus small percentage for overhead
- Credit costs must include all costs to implement projects, including financial assurances and long-term management
- ILF projects as modifications of ILF program instrument (public review process)
- Individual ledgers to track credit production by each in-lieu fee project
- Transfer liability to ILF up front, enforce against ILF

Requirements for Permittee-Responsible Mitigation

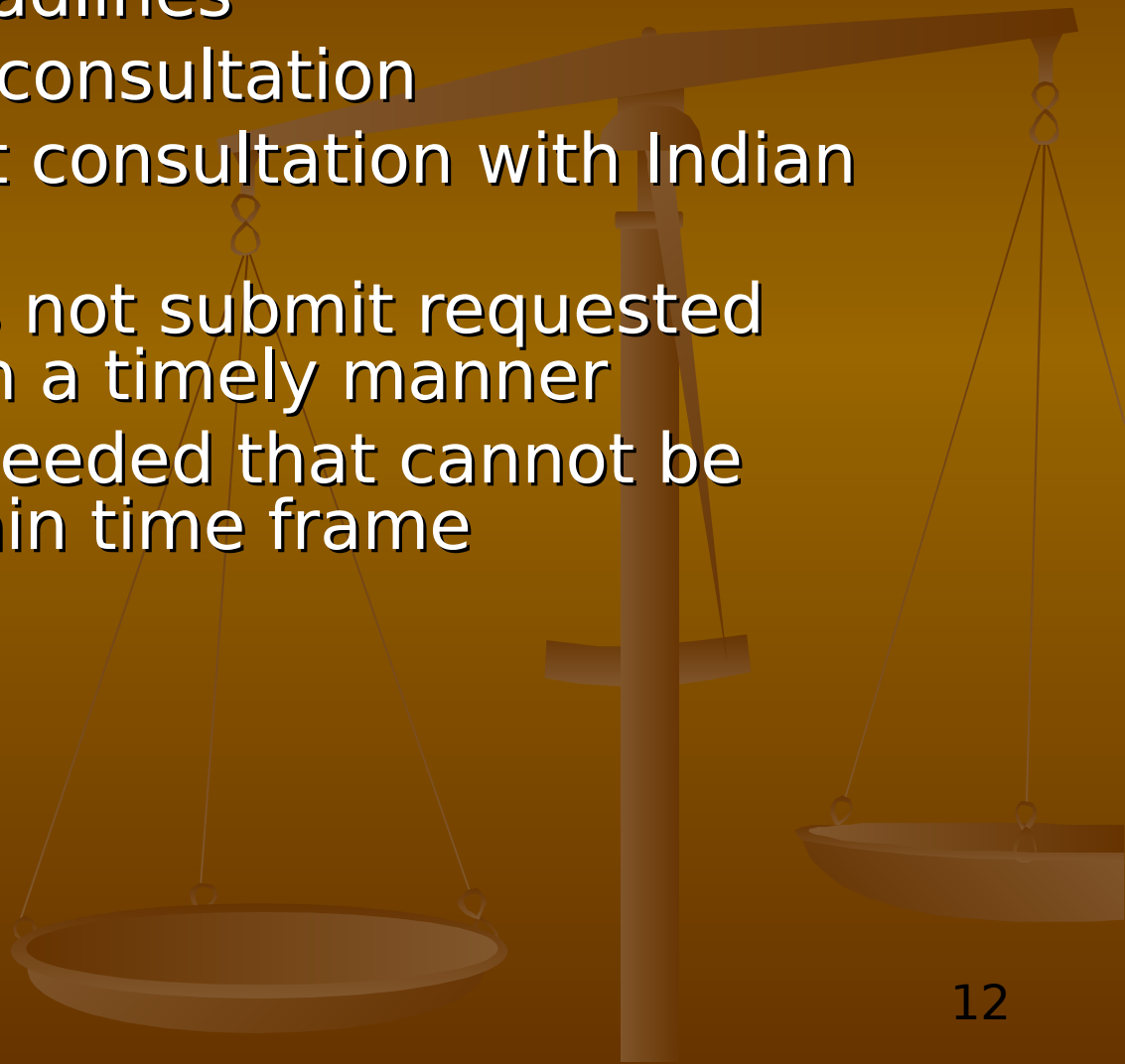
- Site selection based on a watershed approach, or
- On-site / in-kind mitigation, or
- Off-site / out-of-kind
- Provide draft mitigation plan including, where necessary:
  - Objective(s)
  - Site selection information
  - Site protection instrument to be used
  - Baseline information (impact site and mitigation project site)
  - How the project will mitigate for lost functions and values
  - Work plan (specifications and work descriptions)
  - Maintenance plan (ensuring continued viability)
  - Performance standards (ecologically-based)
  - Monitoring requirements
  - Long-term management plan (post-monitoring management)
  - Adaptive management plan (address unforeseen changes)
  - Financial assurances (ensure high level of confidence of successful completion)
- Level of information must be commensurate with the scope and scale of the impacts

Time Frames

- 225 days for Federal review if no dispute resolution process
  - Excludes actions sponsor is required to complete
  - Entire process takes approximately 285 days, if sponsor provides draft instrument within 30 days, and final instrument within 30 days
- 320 days for Federal review if the dispute resolution process is used (380 days total, assuming 30 day submittals for draft and final instruments)

Time Frames – Extensions

- Extension of deadlines
  - ESA or NHPA consultation
  - Gov’t to gov’t consultation with Indian tribes
  - Sponsor does not submit requested information in a timely manner
  - Information needed that cannot be provided within time frame



Transition Period

- Grandfathering of mitigation banking instruments
  - Previously approved instruments, and those approved within 90 days of publication of final rule, can continue to operate under their existing terms, unless there are substantive changes (e.g., adding or expanding sites)
- Grandfathering of in-lieu fee program instruments
  - Previously approved instruments, and those approved within 90 days of publication of final rule, can continue to operate under their existing terms for 2 years after the effective date, unless the DE approves an extension of up to 3 additional years

Questions

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